Canada Industrial Relations Board Conseil canadien des relations industrielles

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Reasons for decision

Maritime Employers Association,

applicant,

and

International Longshoremen's Association, Local 1879,

respondent,

Board File: 29651-C
Neutral Citation: 2012 CIRB 666
December 5, 2012

The Canada Industrial Relations Board (the Board), composed of Ms. Elizabeth MacPherson, Chairperson, and Messrs. John Bowman and André Lecavalier, Members, issued a bottom-line decision on November 27, 2012, in which it declined to issue a declaratory opinion under section 15.1 of the *Canada Labour Code (Part I Industrial Relations)* (the *Code*) and dismissed the request for the determination of a question pursuant to section 65 of the *Code* (*Maritime Employers Association*, 2012 CIRB LD 2920). These are the reasons for that decision.

Counsel of Record

Mr. John Mastoras, for the Maritime Employers Association; and

Mr. Ronald A. Pink, Q.C., for the International Longshoremen's Association, Local 1879.

I–Nature of the Application

[1] On October 12, 2012, the Maritime Employers Association (the MEA or the employer) filed an application under sections 15.1(2) and 65 of the *Code*, and requested that the Board order that arbitration proceedings then in progress before Arbitrator Christopher Albertyn be suspended.

II–Background

[2] By virtue of a certification order issued by the Canada Labour Relations Board (CLRB) on March 8, 1991, the International Longshoremen's Association, Local 1879 (ILA 1879 or the union) is the certified bargaining agent for all employees of employers employed in the checking of cargo in the longshoring industry in the Port of Hamilton. Since July 28, 1993, the MEA has been the designated employer representative for all employers in the longshoring industry in the Port of Hamilton (Board order no. 6274-U).

[3] On January 13, 2011, ILA 1879 filed a policy grievance alleging that Great Lakes Stevedoring (GLS) had violated the collective agreement between the MEA and the union, and specifically Article 13.05 of that Agreement, by failing to hire a foreman while loading trucks or railcars on and after January 5, 2011. The MEA denied the grievance on January 21, 2011, on the grounds that GLS had not engaged in checking cargo while loading salt at Pier 26, and thus was not obligated to employ members of ILA 1879. The grievance was referred to Arbitrator Albertyn for arbitration. A hearing was scheduled for December 5, 2011, but was adjourned at the request of the MEA and rescheduled for February 17, 2012. On that date, the arbitrator dealt with a request for standing from GLS and ordered that the parties provide particulars on certain issues. A further hearing date was scheduled for October 16, 2012.

[4] The MEA filed the instant application on October 12, 2012 and requested that the arbitrator suspend his proceedings. Arbitrator Albertyn refused this request and the arbitration hearing was rescheduled to December 10, 2012.

III–Positions of the Parties

A–The MEA

[5] The MEA suggests that ILA 1879's grievance raises an "essential threshold" issue as to whether the collective agreement between the MEA and the union applies to GLS' truck loading operations. The employer contends that GLS was engaged in loading bulk cargo, namely salt, onto trucks and that ILA 1879's geographic certification does not include checking activities in respect of bulk cargo.

[6] The MEA states that no checking work is performed with respect to salt or other bulk cargo during vessel loading, unloading or terminal operations. It maintains that the union's geographic certification order was not intended to apply to checking work in respect of bulk cargo. The MEA argues that the union's insistence that the collective agreement applies to GLS' work in loading salt is an attempt to expand the scope of its certification order.

[7] In the alternative, the MEA suggests that, if the union's geographic certification order does contemplate the checking of bulk cargo, ILA 1879 has abandoned any bargaining rights it may have had in that respect, as it never previously asserted bargaining rights over, or attempted to apply the collective agreement to, bulk cargo.

[8] The MEA asks that the Board deal with the union's grievance pursuant to section 65 of the *Code*. It asserts that the question of the proper scope of the geographic certification order will be determinative of whether or not ILA 1879's bargaining rights apply to the work that is the subject of the grievance and consequently whether the collective agreement applies to that work. In the alternative, the MEA suggests that only the Board can determine whether the union has abandoned any rights it may have had with respect to the checking of bulk cargo.

B–ILA 1879

[9] ILA 1879 states that the grievance is about whether the work done by GLS required the use of its members. In the union's view, the grievance involves the interpretation and application of the collective agreement, which is a matter within the jurisdiction and expertise of the arbitrator.

It asserts that there is no genuine issue arising from the grievance that requires the Board's involvement.

[10] ILA 1879 denies that the grievance seeks to expand the scope of its geographic certification for the Port of Hamilton. It submits that its certification order covers all types of cargo, and that this fact is recognized in the collective agreement. It notes that the certification of International Longshoremen's Association, Local 1654 (ILA 1654), which represents longshoremen, covers bulk cargo (see, for example, *Rideau Bulk Terminal Inc.*, 2011 CIRB 608). ILA 1879 argues that, if such work is longshoring for members of ILA 1654, then checking in relation to that longshoring work is within the jurisdiction of ILA 1879.

[11] The union contends that the employer has endeavoured, without success, to eliminate the provisions in the ILA 1879 collective agreement that reference bulk cargo. It asserts that the MEA is seeking to obtain from the Board that which it could not achieve in bargaining.

[12] ILA 1879 also denies that it has abandoned its bargaining rights with respect to bulk cargo, arguing that it has always done this work, when it was available. The union states that during the 1980's, there was a significant amount of bulk cargo activity in the Port of Hamilton, but since the early 1990's, the only bulk cargo in the Port has been at Federal Marine Terminals (FMT). FMT is exempted from ILA 1654's certification order and thus is not required to use ILA 1879 checkers as foremen. ILA 1879 asserts that the only reason it has not made claims to bulk cargo work in the Port of Hamilton since 1991 is because of the lack of such work, not because it had abandoned its jurisdiction over the work.

[13] ILA 1879 also points out that the employer did not bring this application to the Board when the grievance was filed in January 2011, but waited until only four days before the scheduled arbitration hearing in October 2012, a delay of some 21 months. The union suggests that the employer's application is simply an effort to delay and defeat the arbitration process and should be dismissed by the Board.

IV–Analysis and Decision

A–Section 15.1(2) of the *Code*

[14] When the *Code* was amended in 1999, an express provision was added to permit the Board to issue declaratory opinions:

> 15.1 (2) The Board, on application by an employer or a trade union, may give declaratory opinions.

[15] The Board summarized its approach to this new power in *TELUS Advanced Communications, a Division of TELUS Communications Inc.*, 2008 CIRB 415, in which it stated:

> [2] In *Ledcor Industries Limited*, 2003 CIRB 216, the Board indicated that it would be very cautious in deciding whether or not to issue a declaratory opinion. The Board set out criteria for the exercise of its discretion under subsection 15.1(2), namely that:
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> (1) there is a valid labour relations purpose for the entire community;
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> (2) the benefit outweighs any mischief; and
>
> (3) there is a solid factual background.
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> [3] Historically, requests for information similar to that at issue in this matter have come before this and other labour relations boards in the context of unfair labour practice complaints, and the union has indicated its willingness to place the issue before the Board in that manner, if necessary. However, the Board sees its role as one of endeavouring to assist the parties in establishing and maintaining constructive labour relations. To this end, the Board would prefer to deal with issues that have been jointly identified by the parties as an impediment to their relationship in a non-adversarial manner, rather than in the context of an after-the-fact complaint over unilateral action by either party that has inflicted further damage on the relationship. The Board will therefore be more inclined to use its powers under section 15.1(2) in cases involving a joint request by the parties for a declaratory opinion.

[16] In this case, although not expressly articulated as such, the employer appears to be asking the Board to issue a declaratory opinion as to whether or not ILA 1879's geographic certification order extends to bulk cargo. The union does not agree with the employer's underlying premise, or that a declaratory opinion is required under the circumstances.

[17] The MEA has provided no evidence to support its assertion that ILA 1879's geographic certification order was never intended to apply in respect of bulk cargo, although it suggested that such evidence could be adduced at an oral hearing. The Board has repeatedly warned parties that they are required to provide their entire case to the Board at the time they make or respond to an application, as the Board is entitled by section 16.1 of the *Code* to determine matters

without an oral hearing (see, for example, *Canadian National Railway Company*, 2009 CIRB 455 at paragraph 31). Consequently, there is no factual background before the Board on which to base an opinion.

[18] Despite its assertion that the Board is better placed than an arbitrator to determine the scope of the union's certification order, the employer has not persuaded the Board that there is a valid labour relations purpose for the declaration it seeks. As noted by the union, the grievance was filed in January 2011, and the MEA waited for more than a year and a half to request the Board's intervention. The employer has not provided a convincing explanation for its delay in bringing this matter to the Board.

[19] In the Board's view, under these circumstances, this is clearly a case where the mischief would outweigh the benefit of a declaratory opinion and the Board accordingly declines to issue such an opinion.

C–Section 65 of the *Code*

[20] Section 65 of the *Code* provides:

> 65. (1) Where any question arises in connection with a matter that has been referred to an arbitrator or arbitration board, relating to the existence of a collective agreement or the identification of the parties or employees bound by a collective agreement, the arbitrator or arbitration board, the Minister or any alleged party may refer the question to the Board for determination.
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> (2) The referral of any question to the Board pursuant to subsection (1) shall not operate to suspend any proceeding before an arbitrator or arbitration board unless the arbitrator or arbitration board decides that the nature of the question warrants a suspension of the proceeding or the Board directs the suspension of the proceeding.

[21] The predecessor to this Board, the CLRB, explained the rationale behind section 65 (formerly section 158) of the *Code* in *Radio CJYQ - 930 Limited (1978)*, 34 di 617; and [1979] 1 Can LRBR 233 (CLRB no. 170):

> The section [158] provides for determination by this Board of issues which can correctly be described as being fundamental to the jurisdiction of an arbitration board established under section 157 of the *Code* to arbitrate differences arising out of the application or interpretation of a collective agreement. Those issues, namely, the existence of a collective agreement or the identification of the parties or employees bound by a collective agreement are matters which the Board has exclusive jurisdiction to determine by virtue of section 118(p)(vi)(vii) and (viii) [now section 16(p)(vi), (vii) and (viii)]. However, the matters referred to in section 118(p) would seem to arise in relation to questions involving the status of relationships between employers and their bargaining agents, the establishing,

> modifying, and revocation of such relationships, and would not ordinarily involve jurisdictional questions arising out of the arbitration of a grievance under a collective agreement. It is unlikely that, in the absence of section 158, a question contemplated by that section arising during the course of arbitration would very easily form the subject matter of a proceeding before this Board under the *Code*. Section 158 removes this obstacle and permits a reference on the questions to be made to this Board by either the arbitration board or any of the parties. Once a referral is made the Board has exclusive jurisdiction to determine the question either by virtue of the general power conferred by section 158 or the specific powers enumerated in subparagraphs 118(p)(vi)(vii) and (viii).
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> (pages 624; and 238)

[22] It is clear from this quote that the intention of section 65 of the *Code* is to allow the Board to determine jurisdictional questions, within its area of expertise, the resolution of which would permit an arbitrator to deal with the merits of a grievance that has been referred for arbitration. The provision was not intended to oust the jurisdiction of an arbitrator to hear the merits of the grievance.

[23] In the instant case, the employer requests that the Board suspend the arbitration proceedings and make a determination that would, if the employer's view prevailed, render the arbitration proceedings moot. In the Board's view, this is not a proper application of section 65 of the *Code*. Even if it were, the Board's authority under this section is limited to questions relating to the existence of a collective agreement or the identification of the parties or employees bound by a collective agreement. In this case, there is no question as to whether there is a collective agreement between the MEA and ILA Local 1879; no question as to who the parties to the collective agreement are; and no question as to which employees are bound by the collective agreement. As the Board understands it, the question before the arbitrator is whether the collective agreement between the MEA and ILA 1879 applies to the work that was done by GLS. While there are mechanisms within the *Code* that enable the Board to review, amend, alter, vary or clarify the scope of a certification order, this is not a question that can be dealt with by the

Board by means of a reference under section 65 of the *Code*. The Board therefore dismisses the employer's request for the determination of a question regarding the scope of the certification order as an impermissible use of section 65 of the *Code*.

[24] This is a unanimous decision of the Board.

Elizabeth MacPherson
Chairperson

John Bowman
Member

André Lecavalier
Member